90-1094

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARRY NAKELL,

Petitioner,

v.

JOE FREEMAN BRITT, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Pro Se

QUESTIONS PRESENTED

1. When Rule 11 sanctions are sought in a case in which there has been no discovery, no hearing, and no trial, by a motion that raises disputed questions of fact requiring credibility determinations regarding the factual bases for the suit and the purposes for its filing, do Rule 11 and the Due Process Clause of the Fifth Amendment require such procedural guarantees as (A) an evidentiary hearing; (B) findings of fact supported by admissible evidence in the record; and (C) conclusions of law that address the legal grounds asserted to support the suit?

2. When a Court of Appeals determines that a District Court should have conducted an evidentiary hearing on a Rule 11 sanctions motion raising

disputed questions of fact requiring credibility determinations, may the Court of Appeals nevertheless affirm that sanctions order on the rationale that the findings made without an evidentiary hearing were not "clearly erroneous"?

3. May a Rule 11 sanctions motion be filed by a defendant more than six weeks after consenting to a court-ordered unconditional dismissal under Rule 41(a)(2), without any prior notice to the court, to plaintiffs, or to plaintiffs' attorneys, of a perceived Rule 11 violation and without any request that the Rule 41(a)(2) dismissal order reserve the right to file such a motion?

PARTIES TO THE PROCEEDINGS

Petitioner Barry Nakell, together with Petitioners William M. Kunstler and Lewis Pitts[1] -- who filed their petitions in Nos. 90-802 and 90-807 on November 19, 1990 -- were the Appellants in the Court of Appeals. They are attorneys who represented two groups of plaintiffs in the underlying action. Petitioners Nakell and Kunstler and other attorneys represented the Robeson Defense Committee, Carnell Locklear, Mary Sanderson, Thelma Clark, Betty McKellar, and Eddie Hatcher. Petitioner Pitts and other attorneys represented Timothy Jacobs and Eleanor Jacobs.

Two groups of defendants in the underlying action filed two motions for

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[1]In the text, the plural "Petitioners" refers to Petitioner Nakell and to Petitioners Kunstler and Pitts in Nos. 90-802 and 90-807.

Rule 11 sanctions against Petitioners. The "State Defendants" were Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, Lacy H. Thornburg, Robert Morgan, James Bowman, James G. Martin, and several Does. The "County Defendants" were Hubert Stone, Robeson County, and several Does.

On Petitioners' counter-motion for sanctions under Rule 11, the Appellees in the Court of Appeals were James J. Coman, Joan H. Byers, and David Roy Blackwell.

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The opinion of the Court of Appeals is reported at 914 F.2d 505; a copy is attached as Appendix A to the petition of Petitioner Kunstler in No. 90-802. The opinion of the District Court is not yet reported; a copy is attached as Appendix B to the petition of Petitioner Kunstler.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1990. The Court of Appeals denied Petitioner's timely petition for rehearing on October 11, 1990. A copy of that order is attached as Appendix C to the petition of Petitioner Kunstler in No. 90-802. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

(A) The Fifth Amendment to the United States Constitution provides, in relevant part: "(N)or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

(B) Petitioner incorporates by this reference the text of Rules 11 and 41(a) of the Federal Rules of Civil Procedure from the Petition of Petitioner Kunstler in No. 90-802, at pages viii-ix.

(C) Rule 52(a) of the Federal Rules of Civil Procedure provides as follows, in relevant part:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law therein . . . .
> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly

> erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

(D) North Carolina General Statutes, Section 7A-60 provides as follows, in relevant part: "The counties of the state are organized into prosecutorial districts . . . ."

(E) North Carolina General Statutes, Section 7A-61 provides as follows, in relevant part:

> "The district attorney shall... prosecute in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district . . . ."

STATEMENT OF THE CASE

On October 14, 1988 after a three-week jury trial in federal court on a seven-count indictment arising out of the February 1, 1988 takeover of a newspaper office in Robeson County, North Carolina, two of the plaintiffs, Eddie Hatcher and Timothy Jacobs, were found not guilty on all charges. Hatcher and Jacobs sought an investigation of Robeson County officials, particularly the Sheriff, and protection from those officials. The takeover ended when the Governor agreed to undertake such an investigation and to arrange for Hatcher and Jacobs to surrender to federal authorities.

The Constitutional Violations. In early November, Hatcher began leading the other plaintiffs in organizing a petition drive to remove the Sheriff. Petitioners' evidence in the record

before the District Court and the Court of Appeals shows that beginning on November 10, 1988, officials in Robeson County responded with a series of actions that interfered with plaintiffs' First Amendment protected activity. That interference by the District Attorney's office and agents of the State Bureau of Investigation (SBI) (the "State Defendants") took the form of an ostensible investigation into a conspiracy in the takeover between Hatcher and other Native American citizens who were then cooperating with the petition drive led by Hatcher. The investigation was undertaken nine months after the takeover incident and after an earlier investigation had concluded there was no evidence of such a conspiracy. The investigation began with press statements, some false or misleading,

unusual for a legitimate conspiracy investigation. It was carried out through interviews designed to intimidate persons about their association with Hatcher rather than to obtain evidence. It resulted in no charges.

The interference by the Sheriff's Department (the "County Defendants") consisted of coercing public school administrators to violate school board policy and cancel plaintiffs' permission to use school facilities for meetings.

On November 11 and again December 13, 1988, Petitioner, as Hatcher's attorney, wrote to the Attorney General of North Carolina asking him to provide protection for plaintiffs' First Amendment rights. The Attorney General assigned Deputy Attorney General Alan Briggs to work with Petitioner. Petitioner and Briggs had productive

telephone conversations over a six week period. Briggs assured Petitioner that action had been taken to correct some of the concern about the conduct of SBI Agents. Petitioner and Briggs began to discuss steps the Attorney General's office could take to protect plaintiffs against constitutional violations by the District Attorney and Sheriff, who were separately elected officials.

Although Petitioner's progress with Briggs appeared promising, on December 19, 1988, the Attorney General wrote to Petitioner, stating:

> "I do not believe that there has been any abuse of process by Bureau Agents in order to intimidate or harass citizens in Robeson County . . . . I will continue to carefully monitor the situation."

Briggs thereafter telephoned Petitioner. He told Petitioner, being "candid and frank," that he knew there were problems

in Robeson County, and that the Attorney General's letter had been a judgment not on the merits but grounded in state politics.[2]

In the meantime Hatcher and Jacobs were indicted on state kidnapping charges arising out of the February 1, 1988 takeover incident. Hatcher was arrested in Robeson County and released on bond. He fled and was arrested in California where he was held pending extradition. Jacobs was arrested in New York and released there pending extradition.

Petitioners learned from friends and family of Jacobs that SBI Agent James Bowman and District Attorney aide Lee Edward Sampson had approached them -- without any notice to Jacobs' attorney,

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[2]Briggs confirmed this statement in his affidavit, though he maintained that he based it on office politics.

Lewis Pitts -- and strongly urged them to persuade Jacobs to fire Pitts and instead hire local Robeson County attorneys. They told Jacobs' family that Pitts was not loyal to Jacobs' interests. On December 29, Petitioners obtained tape recordings of telephone calls made by Bowman and Sampson to Jacobs' family which documented these violations and confirmed that they had coordinated their approaches and made them with the approval of the District Attorney.

The Federal Civil Rights Action. After researching the facts and law and consulting with plaintiffs, Petitioners decided to file a federal action to enjoin those First and Sixth Amendment violations. Because the pending state criminal prosecution was integrally related to both violations, and because the prosecution appeared to have been

brought in "bad faith"[3], Petitioners decided to include a request for an injunction against the state criminal proceedings as well. Petitioners conducted additional extensive factual and legal research and circulated three drafts of the proposed complaint among all the attorneys on the case. They also consulted another attorney with a great deal of successful experience in civil rights litigation. After discussing the facts and legal issues and reviewing the first two drafts of the complaint, that attorney gave Petitioners his opinion that the case was well grounded in fact and law.

Petitioners were prepared to file the complaint on Monday, January 30,

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[3]The factors that led Petitioners to that conclusion are briefly summarized in the petition of Petitioner Pitts, No. 90-807, at pages 48-51.

1989. They delayed the filing for one day[4] to enable Pitts to meet with the District Attorney to explore a plea bargain on the basis of developments over the weekend. When that meeting proved fruitless, Petitioners proceeded with the filing on January 31, 1989. Pitts held one press conference to announce the filing.[5] The only evidence of his statement to the press is the following soundbite from a television news report:

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[4]The Court of Appeals said that Petitioners "initially refrained from filing the complaint in hopes of enhancing Jacobs' plea bargaining opportunities," 914 F.2d at 511, but did not say that the delay was only one day, and was silent about the responsibility of Pitts to explore that opportunity, the difficult situation that the unconstitutional interference with his relationship with Jacobs had imposed on him at the time, and the responsible manner in which he handled that situation.

[5]The Court of Appeals opinion erroneously said that Petitioner Nakell held the press conference.

> **LEWIS PITTS:** We now have the subpoena power. We now possess the power to execute subpoenas, to subpoena individuals and their documents. We possess the power to present in court the real workings of this power structure.

About the same time, a state judge, without any request, without notice, and without a hearing, entered an order in Hatcher's state criminal case that announced that the court "stands ready" to appoint Jacobs "'conflict free counsel,' that is a lawyer who both can and will represent him and his own best interests without regard to, or any conflicts with, anyone else or any other interests." The judge wrote to Petitioners Nakell and Pitts, asking them to inform Hatcher and Jacobs of his order and to write to him advising that they had done so. Both promptly complied. Petitioner included in his response a copy of the recently-filed complaint in

the civil rights case.

Petitioners promptly sought to take the deposition of SBI Agent Bowman, because he was the key witness in both the First and Sixth Amendment claims.[6] The State Defendants filed a Motion For a Protective Order in which they asserted that the Bowman deposition "appears calculated to obtain from the defendants information concerning" the state criminal charges against Hatcher and Jacobs.[7] It also contained a section critical of Petitioner Pitts and his public interest law firm. The State Defendants sent a copy of that motion directly to Pitts' clients, Jacobs and

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[6]The Court of Appeals identified Bowman only as "the case agent in the state's pending criminal action against Jacobs and Hatcher." 914 F.2d at 511-12.

[7]The motion pointed to no evidence to support that assertion.

his mother.

Petitioners promptly filed a motion for an order prohibiting the State Defendants from communicating directly with plaintiffs and from making personal attacks on plaintiffs' counsel. The District Court never ruled on that motion. The District Court did, however, enter an order staying the discovery,[8] promising to "schedule a hearing on the motion as soon as plaintiffs' response is received and reviewed."

Petitioners did then file a timely response to the motion for a protective order. They advised the Court that any suggestion that they sought to depose

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[8]The Court of Appeals erroneously stated: "The district court did not rule on this motion prior to the dismissal of the case." 914 F.2d at 512. Thus, the Court of Appeals misunderstood a critical element in Petitioners' later decision to dismiss the suit. See pages 13-15, infra.

Bowman to gain discovery for the criminal case was groundless. In the federal criminal proceedings, Petitioners had received open-file discovery regarding the same event from the United States Attorney. They also had the benefit of the three-week jury trial in the federal criminal case, and therefore had all the information they needed to defend against the state charges. Finally, Petitioners assured the Court that they would use the deposition solely to substantiate their allegations of "serious continuing constitutional violations:"

> The Complaint alleges that Defendant James Bowman has played a major role in all of the alleged constitutional violations. For that reason, Plaintiffs' judgment to begin discovery with his deposition was and is a reasonable one. Indeed, Plaintiffs anticipate that as a result of this deposition they will be in a position to apply to the Court for temporary injunctive relief and make the showing required by Rule 65(b) of

> the Federal Rules of Civil Procedure. Plaintiffs should be permitted to pursue that standard course of action.

The District Court never scheduled a hearing on the motion. With its stay in effect, Petitioners were unable to take the Bowman deposition which professional prudence required before applying for preliminary injunctive relief.

Defendants filed motions to dismiss. In the meantime, it became apparent to Petitioners that the lawsuit could not achieve its original purpose of protecting plaintiffs against the violations of their First and Sixth Amendment rights. The case had stalled as a result of the District Court's stay of discovery. Defendants' active interference with the petition drive to remove the Sheriff frightened local supporters from further participating,

and the defendants naturally ceased that interference. In addition, Jacobs was extradited to North Carolina. The state judge conferred with Special Deputy Attorney General Joan H. Byers -- counsel for the State Defendants in the pending civil rights case -- about appointing a local attorney to represent Jacobs in the criminal case.[9] The judge appointed an attorney recommended by Byers. Jacobs then decided to enter a guilty plea to the pending criminal action. Thus, the requests for injunctive relief against both the First and Sixth Amendment violations became moot. Although plaintiffs still would be entitled to seek damages, the size of any damage award was problematical. In light of the limited effectiveness of a small award

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[9]Byers admitted this incident in an affidavit.

and the resources that would be required to pursue it, Petitioners and plaintiffs made the difficult judgment not to pursue that relief. Since their primary objectives were no longer obtainable, they reluctantly decided to dismiss the case.

The Voluntary Dismissal With Consent of All Parties. Petitioner telephoned Byers to advise her of that decision and to seek defendants' agreement. She asked for time to confer and called Petitioner back a day later.[10] Byers advised that the State Defendants did not oppose dismissal with prejudice. Petitioner called back to ask if the State Defendants would sign a stipulation pursuant to Rule 41(a)(1)(ii). Byers

[10]Byers disclosed in her affidavit that she secretly tape recorded that telephone call.

said it would take time to get approval and therefore preferred that Petitioners proceed under Rule 41(a)(2). Counsel for the County Defendants agreed to stipulate or agree to the dismissal in any form. The next day Petitioners filed a motion for dismissal with prejudice, representing that defendants did not oppose it.

Defendants did not ask to reserve any terms or conditions in the dismissal order. They never gave Petitioners or the District Court any notice that they perceived a Rule 11 violation.

The Rule 11 Motions. The District Court granted the dismissal motion. After six additional weeks of silence, the State Defendants filed a Rule 11

motion.[11] The County Defendants waited another two weeks and filed their own Rule 11 motion.

Petitioners responded by trying to meet with counsel for Respondents to explain "the circumstances that led to the initiation of the lawsuit to show that it was a reasonable and responsible exercise of professional judgment" and "the changed circumstances that led to

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[11]That motion speculated that Petitioners' purpose in seeking the Bowman deposition had been to obtain evidence, not for the defense of the state charges as they had asserted in their motion for a stay of discovery, but for Jacobs' extradition proceeding.

The motion was full of frivolous arguments, e.g., that Plaintiff Robeson Defense Committee lacked standing because it was not incorporated. See Rule 17(b), F.R.Civ.P. (An unincorporated association "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution"). The District Court at oral argument characterized the motion as containing "a lot of what I refer to as 'bird shot'."

the decision to dismiss it." Respondents' counsel refused to meet, explaining that Petitioners should file their explanation in court.[12]

Petitioners then filed a memorandum opposing the Rule 11 motions, together with documents showing the substantial professional basis for the lawsuit, including: (A) the affidavits of Petitioners; (B) the affidavits of other attorneys and other witnesses; (C) the transcripts of the Bowman and Sampson telephone calls; (D) the relevant correspondence; (E) relevant court documents; and (F) relevant newspaper

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[12]After giving Respondents notice that their Rule 11 motion itself appeared to violate Rule 11 and affording them an opportunity to withdraw it, Petitioners filed a counter-Rule 11 motion.

reports.[13]

Petitioners, through counsel, also moved for an evidentiary hearing.[14]

All parties approached the proceeding on the apparent assumption that the Court would first decide whether there was a Rule 11 violation; if the Court found a violation, it would then provide an opportunity for briefing on what the sanctions should be. The first request the District Court made for any information on sanctions was a letter to

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[13]Respondents filed a reply memorandum which dismissed all of Petitioners' evidence: "Respondents' reasonable and professional basis for the complaint is of no moment in this litigation."

[14]Respondents contended that Petitioners' counsel requested that evidentiary hearing so that Petitioners could get discovery for Hatcher to use in his defense of the state charges. The District Court, in footnote 5 of its opinion, accepted that wholly unsupported speculation. The Court of Appeals did not address this speculation.

counsel for the State Defendants dated September 19, 1988 asking for a "short itemized statement in affidavit form showing time and expense incurred." That letter did not invite Petitioners to submit anything. On September 27, counsel for the State Defendants filed their affidavits, which were dated that day. By letter dated that same day, September 27, the District Court wrote to counsel for the County Defendants, asking for a similar affidavit. On that same day, September 27, counsel for the County Defendants submitted the affidavit that had just been requested by letter dated that very day. On the very next day, the District Court signed its order, awarding sanctions in the precise amount, to the penny, requested by all counsel for Respondents: a total of $92,834.28 against all three petitioners "jointly

and severely" (emphasis added). The Court added $10,000 each because Petitioners "took pains to publicize these allegations through the media."

The District Court opinion. The District Court held: "Nothing in Rule 41(a)(2) bars this Rule 11 motion."

The District Court denied Petitioners' motion for an evidentiary hearing. Yet it rejected all of Petitioners' evidence wholesale:

> Counsel has submitted a stack of affidavits and exhibits purporting to explain why they believed they had a factual basis for filing the suit. The court has reviewed this material and is not impressed. Most of the affidavits, particularly those of counsel,[15] are self-serving and largely based on hearsay and speculation. Counsel may subjectively believe these allegations to be true (and some of

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[15]The District Court did not even discuss the rest of Petitioners' evidence, not even the devastating transcripts of the Bowman and Sampson phone calls to Jacobs' family.

them may even be true), but Rule 11 applies an objective test.

At the same time, the District Court accepted all of the evidence submitted by Respondents, including hearsay media reports and disputed affidavits.[16] It also credited their

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[16]For example, the District Court stated that Neal Rose, the New York District Attorney who was Pitts' adversary in Jacobs' extradition hearing, stated in an affidavit that "Pitts admitted that the civil suit had been commenced as leverage and that it had no basis in fact." What the Rose affidavit actually said was that Pitts "stated in words to the effect that the civil suit in Federal Court North Carolina had been commenced to bring about a favorable plea bargain for Timothy B. Jacobs, and the clear implication of Mr. Pitts' remarks was that there was no factual basis for the lawsuit." (Emphasis added.) Thus, the District Court, which rejected as "speculation" the inferences that Petitioners drew from the evidence they had, reported the Rose inferences as if they were direct quotes without affording Petitioners an opportunity to cross-examine Rose about what Pitts actually said.

The District Court did not even mention the substantial evidence Petitioners presented to dispute the Rose

"speculation," such as their speculation regarding the improper purposes for which Petitioners sought the Bowman deposition and for which their counsel sought an evidentiary hearing in this matter.[17]

The District Court first found that Petitioners brought the action for a

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affidavit. Pitts' New York local counsel provided an affidavit in which he testified that Pitts never said anything that implied that the lawsuit "was merely commenced for leverage to bring about a favorable plea bargain for Mr. Jacobs, nor did he imply that there was no factual basis for the lawsuit." In addition, Petitioners showed that they never did attempt to use the suit as leverage, and three attorneys testified by affidavit that they assisted Petitioners with their plea negotiation efforts and that Petitioners never suggested using the suit as leverage. Finally, of course, Pitts said in his affidavit that he knew he had a strong factual basis for the lawsuit, including the tapes of the Bowman and Sampson calls.

[17]For those reasons, the District Court produced an opinion that was, in the words of Petitioner Kunstler's petition, No. 90-802, at 18, "a caricature of the record."

montage of improper purposes:

> This court is forced to conclude that plaintiffs' counsel never intended to litigate this § 1983 action and that counsel filed it for publicity, to embarrass state and county officials, to use as leverage in criminal proceedings, to obtain discovery for use in criminal proceedings, and to intimidate those involved in the prosecution of Hatcher and Jacobs. All of these purposes are improper and warrant sanctions under Rule 11. Even if the complaint had a proper legal and factual basis, sanctions would be appropriate since this court finds that the purpose of the lawsuit was improper.

"The most damning evidence," the District Court held, was the fact that Petitioners dismissed the suit. It rejected Petitioners' explanations for the dismissal based on the changed circumstances, finding that Petitioners could have continued the action to seek damages and an injunction against the criminal prosecution. It mentioned that

Jacobs had "retained[18] other counsel" but not the critical fact that he had decided to enter a negotiated guilty plea.

The District Court said: "(C)ounsel's assertion that the alleged oppression of civil liberties in Robeson County had suddenly ceased is not credible." Yet Petitioners asserted only that the form of that oppression challenged in plaintiffs' lawsuit had stopped after the officials had succeeded in destroying the petition drive and after plaintiffs had filed this action.

The District Court also relied on the circumstance that the suit was filed on the day before the anniversay of the

[18]Defense counsel had, rather, been appointed by the state judge after direct consultation with Byers, one of the attorneys then representing Respondents.

takeover[19] after waiting "through October, November, December and January." The District Court ignored Petitioners' precise accounting for the date of the filing, including the fact that the First Amendment violations began in November, not October; that Petitioner spent most of November and December unsuccessfully petitioning the Attorney General's office for redress; that Petitioners obtained the tapes of the Bowman and Sampson calls only on December 29; and that they filed the lawsuit one month later after completing the "reasonable inquiry" required by Rule 11, delaying one day to enable Pitts to meet with the District Attorney.

The District Court made much of Petitioners' efforts to take the

[19]Petitioners never sought any advantage from that coincidence.

deposition of Bowman, indulging in speculation that Petitioners sought that deposition for purposes beyond the defense of plaintiffs' rights, despite Petitioners' contemporaneous professional assurances, and efforts by affidavits to demonstrate, that the motive attributed to them was not only false but baseless, since the plaintiffs had no need for any further discovery in preparation for the criminal case.[20]

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[20]The District Court found: "Plaintiffs sought expedited discovery, not because it was necessary to pursue the civil action, but because normal discovery would not have helped them in Jacobs' upcoming extradition hearing in New York. . . . After the extradition hearing, the suit was dropped." The District Court never explained why taking the deposition of a key witness in both the First and Sixth Amendment claims was not "necessary to pursue the civil action."

The lawsuit was dismissed not only after Jacobs' extradition hearing, but also after he had decided to enter a negotiated guilty plea, and after the First Amendment interference had

The District Court also transformed Petitioners' assurance that they intended to use the Bowman deposition to advance this lawsuit into a confession of irresponsibility. Petitioners had averred that "as a result of this deposition . . . they will be in a position to apply to the Court for temporary injunctive relief." The District Court seized on this statement to conclude "that when they filed the complaint asking for a temporary restraining order, they did not possess facts sufficient to establish the necessity of such an order."[21]

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succeeded and ceased.

[21]In order to reach that conclusion, the District Court ignored the evidence that Petitioners presented showing the substantial factual basis they had for their constitutional claims when they filed the suit. This evidence demonstrated extensive prefiling investigation. But even if Petitioners

The District Court also made much of one statement by Petitioner Pitts at the only press conference held concerning this case. The District Court had only a brief news report with one soundbite from that press conference and quoted only the first part of that, "'Now we have the subpoena power . . . .'" The District Court interpreted that partial statement to mean that "the action was filed to gain access to State Bureau of Investigation reports, rather than to vindicate constitutional rights." Pitts certainly did not say that, and the rest

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did not, at the outset of litigation, have all of the information they ultimately needed to prevail, the standard the District Court used was erroneous. See, e.g., Kraemer v. Grant County, 892 F.2d 686, 690 (7th Cir. 1990). Rule 11 is designed only to deter baseless filings, not filings made with a reasonable basis, even though discovery may be necessary or desirable. Discovery is routine under federal civil procedure.

of the incomplete quote makes clear that he intended to use the subpoena power "to present in court the real workings of [the Robeson County] power structure," i.e., the intimidation and harassment of citizens exercising their First Amendment rights.[22] Although Fourth Circuit law established that Pitts had a First Amendment right to speak to the press, Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979) (en banc), the District Court gave considerable force to its misinterpretation of this press excerpt of Pitts' statement, not only in finding a Rule 11 violation but also in finding it to be so "egregious" as to deserve extra fines, and applied it not only to

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[22]The complaint alleged: "These policies and practices contribute to a general climate of fear, effectively chilling and intimidating Indian and Black citizens from the full exercise of their First Amendment freedoms."

Pitts but also to Petitioners Kunstler and Nakell, who represented a different group of plaintiffs and who took no part in the press conference.

The District Court then turned to the legal basis for the lawsuit. The Pitts Petition, No. 90-807, at pages 31-55, summarizes the substantial legal positions that Petitioners presented to the District Court. The District Court did not present any of that material, let alone discuss it.

With regard to the State Defendants' violation of plaintiffs' First Amendment rights, the District Court did not dispute the evidence Petitioners presented or discuss the merits at all. Instead it dismissed plaintiffs' claim on a standing ground, with only a citation to Laird v. Tatum, 408 U.S. 1 (1972). The District Court

did not discuss at all the County Defendants' violation of plaintiffs' First Amendment rights. It gave only brief reference to the violation of Hatcher and Jacobs' Sixth Amendment right to counsel, never mentioning the legal basis for it and never even referring to the conclusive evidentiary basis for it -- the tapes of the telephone calls.

With regard to the request for an injunction against the state criminal case, the District Court relied on one Fourth Circuit decision, Suggs v. Brannon, 804 F.2d 274, 278 (4th Cir. 1986), to conclude that the claim was barred by Younger v. Harris, 401 U.S. 37 (1971). It did not even mention the body of law from this Court and other circuits submitted by Petitioners to show a reasonable basis for concluding that Younger permits this claim, or even

address Petitioners' explanation for distinguishing Suggs v. Brannon. With regard to the Double Jeopardy claim, the District Court found one D.C. Circuit decision, United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976), to be controlling. Again, it did not explain Petitioners' position.

The District Court also criticized other aspects of the complaint. It never set forth Petitioners' position with regard to any of them.

The Court of Appeals opinion. The Court of Appeals ruled that Respondents' failure (i) to give advance notice of a perceived Rule 11 violation or (2) to ask the District Court to reserve its right to file Rule 11 motions as a condition of the Rule 41(a)(2) dismissal, and (iii) the six and eight week delays in filing the Rule 11 motions did not bar the Rule

11 motions, but were equitable considerations. Although the District Court did not even give those factors equitable consideration, the Court of Appeals upheld the District Court's consideration of the motions because it summarily concluded, without explanation, that Petitioners were not prejudiced by Respondents' "delay in filing."[23] 514 F.2d at 513.

On the merits, the Court of Appeals upheld the District Court's decision despite the denial of an evidentiary hearing and despite its erroneous consideration of several items of evidence:

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[23]The District Court made no findings about whether Petitioners were prejudiced by the failure to give notice, the failure to reserve the right to file the motions as a condition of dismissal, or the six and eight week delays in filing the motions.

> Although the number of credibility determinations which the court made without an evidentiary hearing should have suggested to the court than an evidentiary hearing would have been of value, we affirm the court's finding that appellants violated all three prongs of Rule 11 because the findings are not clearly erroneous even excluding some evidence of "improper motive" which appellants contested.[24] 914 F.2d at 522.

The Court of Appeals began by faulting Petitioners for what it identified as "errors" in the complaint. Petitioners' positions with regard to those matters were at least reasonable,

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[24]The Court of Appeals never identified what contested evidence it excluded.

The Court of Appeals also said: "The district judge's participation in the proceedings was adequate to give him full knowledge of the relevant facts without the necessity of an evidentiary hearing." 914 F.2d at 522. But the District Court had held no hearings in the case, had entered only two orders, one granting Respondents' motion to stay discovery and one granting plaintiffs' motion for voluntary dismissal with the consent of Respondents, and had never even met Petitioners.

but the Court of Appeals never fairly presented them.[25]

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[25]For example, the Court of Appeals noted that the complaint asserted that the district attorney

> "serves as the criminal prosecution arm of Defendant Robeson County and as such makes policy in police investigation and criminal prosecution matters for Defendant Robeson County." In fact, N.C.G.S. §§7A-61 et seq. indicates that the District Attorney is an officer of the state, not an agent nor an employee of the county . . . .

N.C. G.S. §7A-60(a) divides the state into prosecutorial districts by counties. N.C. G.S. §7A-61 establishes the duty of the district attorney to perform prosecutorial functions in the name of the state but only in his or her district, defined in terms of counties. The district attorney is elected not statewide but only in his or her district, N.C. G.S. §7A-60(b),(c), and prosecutes only in the Superior Court for a particular county.

Pembauer v. Cincinnati, 475 U.S. 469, 484 (1986), held that a prosecutor may be in a position to establish county policy for purposes of county liability. Thus, petitioners' position was at least reasonable. See generally, Jett v. Dallas Indep't School Dist., 109 S.Ct. 2702, 2723 (1989); St. Louis v. Praprotnik, 485 U.S. 112, 123-127 (1988) (plurality opinion); id. at 137-140 (concurring opinion); id. at 170

The Court of Appeals then addressed the legal basis for the complaint. Its full discussion of the State Defendants' violation of plaintiffs' First Amendment rights is as follows:

> (O)n the claim that the prosecution chilled Hatcher and Jacobs' First Amendment expression, the complaint presented no facts showing specific harm or threat of harm, as required by Laird v. Tatum, 408 U.S. 1 (1972). Appellants respond that they did show concrete and specific harm insofar as plaintiffs' participation in the petition drive was curtailed. However, Mr. Hatcher and Mr. Jacobs' participation was not curtailed.

The Court of Appeals did not fairly set forth the basis of the claim, which was that the First Amendment rights of all plaintiffs, not just Hatcher and Jacobs, were violated; that the sham "conspiracy investigation," which was carried out in an intimidating manner and

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(dissenting opinion).

which produced no charges, was the primary method of infringement; that the Sheriff's Department's coercing the schools to deny their facilities to plaintiffs contributed to the infringement; and that the criminal prosecution of Hatcher and Jacobs completed the pattern of harassment.

Moreover, the Court of Appeals failed to discuss at all the substantial legal foundation that Petitioners relied upon in support of the claim. The Pitts petition explains why Laird[26] cannot remotely be considered controlling. See

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[26]Laird held that though "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights," 408 U.S. at 12-13, surveillance may not infringe First Amendment activities if the only way it has a "chilling effect" is that it generates fear that "the agency might in the future take some other and additional action detrimental to that individual." 408 U.S. at 11, 13-14.

also, Meese v. Keene, 481 U.S. 465, 472 (1987) (holding that plaintiff has First Amendment standing to challenge the Justice Department's characterization of three films that he wanted to exhibit as "political propaganda," because that characterization would harm his reputation and therefore deter him from exhibiting them).

With regard to the County Defendants' coercing public school authorities to deny use of their facilities to plaintiffs, the Court of Appeals -- like the District Court -- avoided discussing this claim, even though the District Court granted the Rule 11 motion on behalf of the County defendants.

The claim for an injunction against the coordinated official activity to disrupt the right to counsel at least of

Jacobs was a remedy suggested in United States v. Morrison, 449 U.S. 361, 367 (1981), yet the Court of Appeals' only reference to the claim was the incomplete statement: "Appellants contend that they also believed that there was an illegal campaign to split Jacobs from Hatcher, and to interfere with Jacobs' right to counsel by persuading him to hire local counsel." 914 F.2d at 511. That brief characterization ignored the heart of Petitioners' claim: that after Jacobs' state indictment the officials went behind the back of Jacobs' counsel to persuade Jacobs, through his family, to fire his counsel of choice. It also neglected Petitioners' legal position, see Pitts Petition, No. 90-807, at pages 34-35; see also, Minnick v. Mississippi, ___ U.S. ___ (1990) (Fifth Amendment), and the devastating evidence in support

of that claim: the tapes of telephone calls that caught officials in the very act of unconstitutional conduct.[27]

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[27]The Court of Appeals, like the District Court, criticized Petitioners for erroneously pleading this violation under the Fifth Amendment on behalf of Hatcher. The Court of Appeals opinion states: "Appellants make no attempt to explain away this glaring blunder." 914 F.2d at 517. But this Petitioner did so:

> The original complaint alleged the joint defense theory in considerable detail. App. 446-450. The joint defense theory was based on the Sixth Amendment....
>
> Although the constitutional violation was well established with regard to Jacobs, it required a good faith argument for an extension of the law to apply it to Hatcher. The State Defendants could constitutionally have approached Jacobs through his counsel, Pitts, and obtained his cooperation against Hatcher, but Appellants were prepared to make a reasonable argument that the unconstitutional approach to Jacobs through his family behind the back of his counsel violated the Sixth Amendment rights of Hatcher as well as Jacobs because of the cooperative character of their defense. The First Amended Complaint correctly alleged this theory in Paragraph 50, App. 52,

With regard to the injunction against the criminal proceeding, the Court of Appeals at least acknowledged that the decisions of this Court and other circuits discussed in the Pitts petition, No. 90-807, at pages 50-55, support Petitioners' position, but held that one of its own decisions foreclosed that position in the Fourth Circuit.[28]

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but mistakenly added a Paragraph grounding it in the Fifth Amendment on behalf of Hatcher. App. 52. The District Court correctly criticized that mistake. App. 21. The Court chose to highlight that mistake while ignoring the substantial claim in Paragraph 50 solidly based on the facts represented by the tapes of the Bowman and Sampson telephone calls.

The Court of Appeals chose to do the same.

[28] Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1988). If Suggs were controlling, that holding would raise the question whether Rule 11 sanctions may be imposed on an attorney who brought an action in reliance on decisions of this Court and other circuits simply because it

With regard to the Double Jeopardy issue, the Court of Appeals agreed with the District Court that one D.C. Circuit decision was decisive.[29]

The Court of Appeals upheld the denial of an evidentiary hearing on the ground that the District Court's findings were not "clearly erroneous." 914 F.2d 520, 522. It further ruled that it was

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Cf., U.S. v. Rios, 110 S.Ct. 1845, 1851 (1990); Procunier v. Navarette, 434 U.S. 555, 563-5 (1978). However, Suggs is distinguishable, as discussed in the Pitts petition, No. 90-807, at 53-54.

[29]The Court of Appeals did not, however, fairly set forth Petitioners' position: Under the extraordinary circumstances in this case it was reasonable for Petitioners to invoke the "tool of the same authorities" theory of the Double Jeopardy Clause and contend that the exception discussed in Bartkus v. Illinois, 359 U.S. 121, 123 (1959) -- that the Double Jeopardy Clause would bar a second prosecution where federal authorities had been the motivating force behind both state and federal prosecutions -- should apply equally where State authorities were the moving force behind both prosecutions.

not "an abuse of discretion" for the District Court to rely on media reports and disputed affidavits. 514 F.2d at 520. The Court said "there was no proper purpose for appellants' filing of the suit." Id.[30]

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES IMPORTANT QUESTIONS AS TO WHAT MINIMUM PROCEDURAL PROTECTIONS MUST BE PROVIDED IN RESOLVING CONTESTED FACTUAL ISSUES REGARDING ALLEGED VIOLATIONS OF RULE 11.

In Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990), this Court held that appellate courts should review under a "deferential standard" district court decisions imposing sanctions. Id. at 2458. "(A)n appellate court should apply

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[30]The Court of Appeals set aside the $10,000 fine against each Petitioner and remanded the rest of the award for redetermination of the amount. 914 F.2d at 522-25.

an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." Id. at 2461. At the same time, the Court held: "Of course, this standard would not preclude the appellate court's correction of a district court's legal errors . . . ." Id. at 2459.

This case raises significant questions concerning the judicial administration of Rule 11 whether -- in the Rule 11 context, unlike all others -- the "clearly erroneous" standard should apply to findings of fact based on credibility determinations made after an erroneous denial of an evidentiary hearing, and whether the "abuse of discretion" standard should apply to findings of fact made after the erroneous inclusion of evidence.

It should be clear that the

District Court acted improperly in making credibility determinations on the basis of affidavits. See, Anderson v. Liberty Lobby, 477 U.S. 242, 249, 258 (1986); Louis, "Federal Summary Judgment Doctrine: A Critical Analysis," 83 Yale L.J. 745, 758 (1974). "Particularly where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision." Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Mathews v. Eldridge, 424 U.S. 319, 343-44 (1976).[31]

The Court of Appeals recognized that "determinations of credibility are

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[31]Thus, on a motion for summary judgment, the written submissions "must be viewed in the light most favorable to the opposing party." Adickes v. Kress & Co., 398 U.S. 144, 157 (1970); see also, Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

The District Court unjustifiably did just the opposite.

best made after an evidentiary hearing," id. at 520, and that "an evidentiary hearing may well be necessary" "(w)hen there are issues of credibility, disputed questions of fact, and rational explanations of purpose given" -- particularly "when large sanctions are being considered on the ground of improper purpose." Id. It found that "an evidentiary hearing would have been of value" in this case because of "the number of credibility determinations." Id. at 522.

Nevertheless, the Court of Appeals upheld the denial of an evidentiary hearing because it concluded that the District Court's findings were "not clearly erroneous". Id. at 520. That was a misuse of the "clearly erroneous" doctrine.

The "clearly erroneous" standard

applies only to findings made by a court after a trial. Rule 52(a), F.R. Civ.P. When the court makes findings solely on the basis of affidavits, as in a motion for summary judgment, the "clearly erroneous" standard does not apply. Riley v. Brown & Root, Inc., 896 F.2d 474, 476 (10th Cir. 1990); Conway v. Smith, 853 F.2d 789, 792 (10th Cir. 1988); Spannous v. U.S. Department of Justice, 813 F.2d 1285, 1288 n.4 (4th Cir. 1987) ("Any findings of fact made on a summary judgment motion . . . are not 'entitled to the protection of the "clearly erroneous" rule on review.' Wright & Miller, Federal Practice and Procedure: Civil § 2575 (1971).") The proper response of an appellate court confronted with a denial of fundamental procedure is not to repeat the District Court's error. Cf., Anderson v. City of

Bessemer City, N.C., 470 U.S. 570, 573 (1985). Rather, the responsibility of the appellate court is to remand for an evidentiary hearing.

The "clearly erroneous" standard is meaningless on review of one-sided findings of fact without an evidentiary hearing. Moreover, the Rule 11 goal of deterring baseless filings, Cooter & Gell, 110 S.Ct. at 2254, cannot be achieved without fair findings of whether a filing is baseless.

The Court of Appeals also criticized the District Court for discussing the improper purpose prong before discussing whether the complaint was well grounded, id. at 518, and for a variety of errors in its treatment of the documentary evidence before it. It noted that the District Court had relied on unsubstantiated press reports. Id. at

517 and n.2. It found at least two misrepresentations of the evidence. Id. at 514 n.1, 517 n.2. It determined that at least two of the "improper purposes" upon which the District Court relied, including one the District Court considered "egregious," were not improper at all. Id. at 520. In addition, the panel felt compelled to exclude "some evidence of 'improper motive' which appellants contested," id. at 522 -- though it never identified which evidence it excluded and though it did consider some evidence that Petitioners vigorously contested, such as the Rose affidavit. Id. at 520.

This large roster of evidentiary errors raises a serious question regarding whether the District Court abused its discretion. The "clearly erroneous" standard may not be used in

this situation to avoid "the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance." Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982). "(W)here findings are infirm because of an erroneous view of the law, a remand is the proper course . . . ." Id. at 292.

This case raises the further important question whether the District Court should be required to make written findings of fact and conclusions of law that fairly discuss all factual and legal issues. The principal purpose of the requirement in Rule 52(a) of the Federal Rules of Civil Procedure that a court "find the facts specially and state separately its conclusions of law" in all actions tried on the facts without a jury, "is to aid the trial court in

making a correct factual decision and a reasoned application of the law to the facts." 5A Moore, FEDERAL PRACTICE 52-82 (1989); see also, Rule 52, Committee Note of 1946 to Subdivision (a); 9 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE 680 (1971). A second reason is to aid the appellate court. Although Rule 52(a) by its terms does not apply to most motions, "its objective is to have the trial judge set forth his findings of fact and conclusions of law in cases where he is the trier of fact . . . when his decision turns in part upon a factual determination," 5A Moore, supra at 52-137, and its purposes are important to Rule 11 motions.

There are two additional reasons for requiring clear and fairly presented findings and conclusions in the Rule 11 context. A sanctions order can serve its

central goal of deterring baseless filings only if it adequately explains the violation so the attorneys may know what improper conduct to avoid. Moreover, the sanctions order itself, as a reprimand, is likely to be a substantial part of the sanction; it may be the complete sanction. The order must therefore fairly describe what the attorneys did. If the order exaggerates their wrongdoing, it is to that extent excessive as a sanction.

To serve all of those purposes the findings and conclusions may not be merely "general conclusions," Schneiderman v. United States, 320 U.S. 118, 130 (1943), but must be made "in such detail and exactness as the nature of the case permits." Kelley v. Everglades Drainage Dist., 319 U.S. 415, 422 (1943).

II.

THE DECISION BELOW -- WHICH IS IN CONFLICT WITH DECISIONS OF THE SECOND, THIRD, FIFTH AND NINTH CIRCUITS -- RAISES AN IMPORTANT QUESTION WHETHER A PARTY MAY FILE A MOTION FOR RULE 11 SANCTIONS WITHOUT ANY ADVANCE NOTICE AFTER CONSENTING TO A VOLUNTARY DISMISSAL WITH PREJUDICE UNDER RULE 41(a)(2).

The decision below raises the important question whether defendants may file a Rule 11 motion more than six weeks after a case has been voluntarily dismissed with their consent, despite their failure to give any notice of a perceived Rule 11 violation. The Rule 11 Advisory Committee Notes emphasize: "A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." The Third and Fifth Circuits have held compliance with this notice requirement a prerequisite to a Rule 11 motion. Mary Ann Pensiero, Inc.

v. Lingle, 847 F.2d 90, 99-100 (3d Cir. 1988); Thomas v. Capital Sec. Serv., 836 F.2d 866, 879 (5th Cir. 1988) (en banc).

Moreover, Rule 41(a)(2) expressly provides that a dismissal by court order should be "upon such terms and conditions as the court deems proper." As Petitioner Kunstler's petition in No. 90-802 demonstrates, at pages 8-13, the Second, Barr Labs., Inc. v. Abbott Labs., 867 F.2d 743 (2d Cir. 1989); Colombrito v. Kelly, 764 F.2d 122, 134 (2d Cir. 1985), and Ninth Circuits, Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 554-55 (9th Cir. 1987), cert. den., 484 U.S. 823 (1987); Lau v. Glendora Unified School Dist., 792 F.2d 929 (9th Cir. 1986), and several District Courts have held that defendants have an obligation at the time of a Rule 41(a)(2) dismissal to ask the Court to reserve their right

to file a motion under Rule 11 if they desire to do so.

Petitioners advised the District Court that, had they known Respondents would seek sanctions, they might have taken that into consideration in the evaluation that went into the dismissal decision. They "deserved such notice and an opportunity to proceed with the litigation," Andes v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986),[32] at least as to the damage claims.

Respondents have offered no explanation for their failure to give such notice, their failure to seek such a reservation, or their delay of more

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[32]The Court of Appeals -- while sanctioning Petitioners for not yielding to the distinguishable circuit precedent of Suggs v. Brannon -- did not even discuss this Rule 41(a)(2) circuit precedent -- Andes v. Versant Corp. -- supporting Petitioners' position.

than six and eight weeks in filing their motions. That ambush approach is not consistent with Rule 11's "central goal of deterrence." Cooter & Gell, 110 S.Ct. at 2454. "To allow such behavior would effectively transform Rule 11 from a shield to a sword, whereby guileful practitioners could profit from the misfortunes and mistakes of fellow professionals." Thomas, 836 F.2d at 881.

III.

THE EFFECT OF THE DECISION BELOW IS TO DEPRIVE AN ATTORNEY NOT ONLY OF HIS PROPERTY BUT OF HIS GOOD NAME AS WELL WITHOUT ANY PROCEDURAL SAFEGUARDS.

In Cooter & Gell, this Court stated "that the central purpose of Rule 11 is to deter baseless filings . . . ." 110 S.Ct. at 2454. A position that is "substantially justified" because it "has a reasonable basis in law and fact" does not violate Rule 11. Id. at 2459. The

standard is "whether a legal position was reasonable or plausible enough under the circumstances." Id. at 2460. This standard is consistent with the principle this Court established in a non-Rule 11 context in Strickland v. Washington, 466 U.S. 668, 689 (1984):

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Similarly, in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978), this Court said:

> (I)t is important that a District Court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not

> ultimately prevail, his action must have been unreasonable or without foundation.' This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. . . . (N)o matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. . . . Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Petitioners deserve commendation, not condemnation, for their conduct of this lawsuit. They deserve commendation for delaying the filing for over six weeks in order to seek the assistance of the State Attorney General in protecting plaintiffs against the First Amendment violations. They deserve commendation for thoroughly researching the facts and law and consulting outside counsel before filing the suit. They deserve commendation for promptly endeavoring to

prosecute the lawsuit by taking the deposition of key witness Bowman. And they deserve commendation for courageously deciding to dismiss the lawsuit when the circumstances changed, and when the lawsuit stalled with the District Court's stay of discovery.

But those commendable actions were unjustifiably transformed by the District Court into evidence of improper purposes. Rule 11 does not authorize the District Court to regard everything Petitioners did with suspicion rather than with the presumption of reasonableness appropriate to the honorable calling that civil rights litigation is.

Particularly with their conclusions of "improper purposes," the opinions in this case themselves inflict on Petitioners a far greater injury than the

substantial financial sanctions.[33] The opinions impugn not only their professionalism but also their integrity -- and they do so without a fair portrayal of their position, their conduct or their motivation -- and without the rudiments of due process.

Last Term in Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990), this Court noted the history and need for a remedy "for damage to a person's reputation by the publication of false and defamatory statements:"

> In Shakespeare's Othello, Iago says to Othello:
> "Good name in man and woman, dear my lord

[33]Plaintiffs did not measure their objectives in the civil rights suit and Petitioners did not measure the value of their service in the federal or state criminal prosecution or in the civil rights suit by a financial reward. It is ironic that the District Court chose that standard by which to penalize them so excessively.

> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed."
> Act III, scene 3. Id. at 2702.

For Petitioner, a reputation for public service in the highest tradition of the bar earned by decades of dedicated service to the law and to the federal courts[34] has been devastated by the

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[34]Petitioner has accepted appointment by this Court, the Court of Appeals, and the District Courts in dozens of cases. E.g., Reed v. Ross, 486 U.S. 1 (1984); Bounds v. Smith, 430 U.S. 817 (1977); subsequent history: Smith v. Bounds, 841 F.2d 77 (4th Cir. 1988) (in banc), adopting, 813 F.2d 1299 (4th Cir. 1987), cert. den., 488 U.S. 869 (1988). As a professor, he supervised students who inaugurated the Fourth Circuit's student practice rule in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. den., 415 U.S. 983 (1974); see also, "Fourth Circuit Student Advocacy Conference," 87 F.R.D. 159, 191, 198 (1978). For 17 years he has been providing legal services to the

calumny of two federal court decisions. What kind of legal world has Rule 11 wrought that so jeopardizes an attorney with so little safeguard? Petitioner respectfully asks this Court how an attorney can defend against a Rule 11 motion when his evidence is rejected out of hand, when he is accorded no credibility, when his conduct in presenting, prosecuting and dismissing a case is viewed with suspicion instead of professional respect, when he is denied an evidentiary hearing, and when he is denied even a fair exposition of his position? Under those circumstances, an attorney has no safeguard for a fair adjudication, no safeguard against a

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minority citizens of Robeson County to assure them access to the legal system. E.g., Locklear v. North Carolina State Board of Elections, 514 F.2d 1153 (4th Cir. 1975).

biased, compliant, or overzealous court, a special risk for attorneys willing to undertake representation in controversial cases.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this petition be granted.

Respectfully submitted,

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